IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 440 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SALIM YUNUS SOPARIWALA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 440 of 2001

M/S THAKKAR ASSOC. for Petitioner No. 1

MR I.M. PANDYA, LD. A.P.P. for Respondent.

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 17/06/2004

C.A.V. JUDGMENT

The present Revision Application is preferred by the petitioner-orig. accused no.1 of Criminal Case No.1059/95, pending in the Court of learned Judicial Magistrate (F.C.), Pardi, facing criminal trial of the

offence punishable under Sections 7 and 16 r/w. 2(ia)(a) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the PFA Act').

2. The order under challenge dated 29th June, 2001, is of rejection of application praying for discharge by the present petitioner and by the said order further directed to send the third sample for reanalysis to the Central Food Laboratory (hereinafter referred to as 'CFL'). It is contended that the third sample, consequent to the order under challenge sent to the CFL on 4th July, 2001, has been declared adulterated within the meaning of provisions of the PFA Act. At this stage it is relevant to note that immediately after the order under challenge passed on 29th June, 2001, the petitioner-accused had prayed for suspension of the order sending the third sample for reanalysis vide application Exh.14 but the same was rejected.

3(i) The grievance of the petitioner before this Court is that the procedure of sending the third sample for reanalysis is completely contrary to the provisions of the statute as the CFL has no mandate or authority to seek the third sample except the circumstances as detailed under Section 13(2)(C) of proviso. The proviso says that when the sample sent by the Court to the CFL is either lost or damaged, the third sample can be sent or called for for reanalysis. In the present case, it is not a matter of dispute that the sample was lost or damaged, on the contrary, it is on record that it was duly received by the CFL and it was also analyzed by the expert but the CFL could not send the report of analysis. In other words, the say of the petitioner is that the report of analysis was not issued in a reasonable period from the date of analysis for inconveniencing and irrational reasons.

3(ii) It is also the say of the petitioner that he has been denied his inalienable right of reanalysis under Section 13(2) of the PFA Act and his defence is being seriously prejudiced by the extraordinary delay in the matter. The petitioner was compelled to move the application for discharge under Section 245 of the Criminal Procedure Code and had moved the application raising serious legal objections in sending the third sample for reanalysis. One more grievance expressed by the petitioner before the Court is that the order dated 29th June, 2001, has been passed by the learned trial Court after a period of more than six years.

3(iii) Despite the said objections and submissions that

the petitioner would seek to challenge the said rejection i.e. order of rejection of application praying discharge and also of sending the third sample for reanalysis, the sample was sent to CFL on 4th July, 2001. It is relevant to mention that the sample bears the packing date of January, 1994 and it can be considered to have been tested/analyzed after a period of seven years and six months from the date of manufacture. The report of CFL was received by the learned trial Court on 20th July, 2001. On the date of filing of the revision the learned trial Court had fixed the matter for framing of charges and it is contended that the orig. accused nos.4 and 5 were not even served the date on which the learned trial Court had received the report from the CFL.

4. The petitioner has challenged the order mainly on two grounds mentioned in para :4 of the memo of the petition and it is argued that the learned Magistrate has failed in appreciating the fact that the inalienable and mandatory right of the petitioner-accused, as provided under Section 13(2) of the PFA Act, of having the second sample of the product reanalysed by the CFL has been effectively denied inasmuch as despite having applied for such analysis and the same having been ordered and sent on 25th July, 1995, the CFL had failed over a period in excess of six years in sending its report of reanalysis, if the same had genuinely taken place. When a report of the analysis made at the request of the accused, if has not been provided, then it amounts to effective denial of the right and benefit flowing to the accused. It is argued by the learned senior counsel Mr.P.M. Thakkar that the right of reanalysis is a statutory prerequisite, that too as per the time schedules prescribed under the statute i.e. under Section 13(2) of the PFA Act. It is further submitted that :

"(a) Under the provisions of Rule 9-B the Local Health Authority is required within a period of 10 days after the institution of a prosecution, to forward a copy of the report of the results of the analysis in Form III by Registered A.D. or by hand to the person from whom the sample for analysis was taken as also to the person whose address is disclosed under Section 14-A of the Act.

(b) That under Section 13(22) such person may, within a period of 10 days from the date of receipt of copy of the report, seek to exercise his right to have the second sample re-analysed

by the Central Foods Laboratory.

(c) That under Section 13(2)(A) the above said application being made and allowed, the Local Health Authority shall upon a requisition by the Court, forward the second sample to the Court within a period of 5 days.

(d) Under Section 13(2)(B) the Director of the Central Foods Laboratory shall upon receipt of the said second sample and completion of inward formalities, send a certificate to the Court in the prescribed form within one month from date of receipt of the said second sample. Such certificate of the Central Foods Laboratory by virtue of Section 13(3), supersedes the report of the Public Analyst and as interpreted by the Hon'ble Supreme Court, once the said Central Foods Laboratory report is issued, no reliance can be placed on the Public Analyst's report nor can the same be considered in any manner as the same is treated to be nonexistent."

5. To appreciate the say of the petitioner and the contentions raised before the Court by Mr.N.V. Mehta, Food Inspector, orig.complainant vide affidavit-in-reply, it would be beneficial to refer to the basic relevant facts. Mr.N.V. Mehta, orig. complainant-Food Inspector, Vapi, Dist.Valsad, on 9th February, 1994 drew a sample of Kissan Tomato Ketchup from the premises of the petitioner-orig.accused no.1 for analysis under the PFA Act and the rules framed thereunder. Upon analysis, the Public Analyst declared the sample as adulterated as "not confirming to the prescribed standards". The description of the sample, according to the case of the prosecution, is mentioned in the report of the analysis as well as in the relevant document including Panchnama, which says that :

"Orange red coloured thick liquid packed in a glass bottle labelled Kissan Tomato Ketchup, Net contents 200 Gms., M.R.P. Rs.12-00. Mfd. By Kissan Prds. Ltd. Bangalore. Pkd. Jan.-94 & Batch no.41101 is mentioned on the label."

6. After obtaining sanction from prosecution, the orig.complainant-Food Inspector filed a Criminal Complaint in the learned trial Court alleging the violation of Sections 7 and 16 of the PFA Act. The petitioner-orig.accused no.1 in exercise of his rights for reanalysis as prescribed under Section 13(2) of the

PFA Act, requested the learned Magistrate for reanalysis of the second sample by the CFL and tendered his appearance in the complaint. The said application was allowed and the Local Health Authority was directed to deposit the second sample to the respective CFL. The second sample was deposited before the learned trial Court on 28th June, 1995 i.e. after a period in excess of three months. Ultimately, the second sample was sent to the CFL, Gaziabad on 25th July, 1995, as referred earlier by R.P.A.D. and it had reached to the destination on 1st August, 1995. The CFL, Gaziabad had not sent the report under its statutory obligation to the learned trial Court and, therefore, the learned Magistrate sent several reminders but the CFL failed in providing the report of analysis undertaken and its finding recorded on analysis of the second sample sent by the learned trial Court. Ultimately vide letter dated 20th December, 2000, the Director of CFL, Gaziabad intimated the learned trial Court that the sample was duly received and the same was analyzed by the CFL but the report of analysis could not be prepared and, therefore, the CFL would need the third sample for reanalysis and preparation of the report. This letter has been produced by the petitioner with the memo of the petition vide Annexure-G. The copies of the letters/reminders are also produced vide Annexure-F and it is relevant to note at this stage that these reminders are of (i) 22nd November, 1995, (ii) 13th March, 1996, (iii) 23rd April, 1997,(iv) 21st November, 1997,(v) 27th November, 2000. It is true that by writing reminder no.6 dated 27th November, 2000, the learned Judicial Magistrate (F.C.), Pardi, raised a query and sought for explanation, wherein the learned Magistrate has stated that, "

> "We have clarified the matter by our letter No.66/98 dtd.6/3/98. So correspondence shows that you have received the sample. Instead of doing analysis and sending report of analysis you have demanded third part of sample. Please clarify about the same received by you. After receiving report the court will consider the matter and send the third part of sample to you."

7. The letter dated 27th November, 2000 (Reminder No.6) was responded by the Director of CFL, vide above referred document at Annexure-G to the memo of the petition. It would be beneficial to quote the relevant part of the communication at Annexure-G, which is as under:

"The sample of Tomato Ketch-up was received in the laboratory and analysed, but the report was not issued by the previous Director, who was placed under suspension on 7.4.2000.

For sending the report, the original bottle is required to check the label declaration. Therefore, third counterpart of the sample is required to complete the formalities for issuing the report.

Hence, it is required, the third counterpart of the sample may be sent so that the pending report may be issued at an early date."

8. Thus, it is clear from the record that the sample of Tomato Ketchup sent to the CFL for analysis on 25th July, 1995, was received by the CFL but in a stipulated period of time the report from CFL was not received by the learned trial Court. The Director of CFL was under statutory obligation to send the report/certificate to the trial Court in the prescribed form within one month from the date of receipt of the part of sample specifying the result of the analysis. Therefore, only above referred reminders were sent by the learned trial Court to the Director of CFL. The stand taken by the complainant-Food Inspector Mr.Mehta in the affidavit-in-reply is that the second sample on the very next date of receipt of the requisition from the Court was brought before the Court from the Local Health Authority and it was submitted for analysis to the CFL. So there is no violation of Section 13(2)(A) of the PFA Act. On the other hand, the stand taken by the petitioner-accused is that nonreceipt of the certificate from the CFL within one month would make the prosecution bad, especially when there is no element of justification or on foreseen circumstances which emerge on record, then absence of report of analysis would become relevant and it would be difficult for any Court to accept that the report/certificate sent by the CFL is the report of analysis carried out in the year 1995 and not of the third sample sent in the month of July, 2001. Two different dates at two different places in the first part of the certificate are mentioned and the report is not specific that the opinion is expressed on the basis of the analysis carried out in the year 1995. A pointed query was raised by the Court to the ld. A.P.P. Mr. I.M. Pandya and on the instructions received from the complainant, the ld.A.P.P. has fairly accepted that yet the CFL has not returned the third sample, which was intact and in a sealed condition, sent by the Court. If the request made by the Director of CFL vide letter dated 20th December, 2000, was genuine that the original bottle

(third sample) is required to check the label declaration for sending the report, then the Director of CFL ought to have sent that very bottle back to the trial Court with the certificate. I am afraid that the explained infirmity emerging from record could have helped the prosecution in any manner because it is clear that the sample sent for analysis earlier to the CFL under Section 13(2)(B) of the PFA Act, was very well received by the Director of CFL, and it is not the case that the same was either lost or damaged, as provided under Section 13(2)(C) of the PFA Act. At this stage, it is very relevant to note that even as per the case of the prosecution and the stand taken by the complainant in the affidavit-in-reply, the Director of CFL, who was aware and conversant with the analysis allegedly carried out, was placed under suspension on 7th April, 2000, not within a period of one month from the date of receipt of the sample for analysis in the year 1995. There was no reason for the Director of CFL to put a cover on the correct fact which must have happened immediately after receipt of the sample in the year 1995 and the date on which the letter at Annexure-G was written.

9. This aspect should be appreciated in light of the language of the letters written by the learned Judicial Magistrate (F.C.), Pardi, to the Director of CFL on various dates on earlier occasions. It is settled that the legal impact of a certificate of the Director of CFL is that it annuls or replaces the report of the Public Analyst. It gains finality regarding quality and standard of food article involved in the case and it becomes irrefutable so far as the facts stated therein are concerned; and the right of the accused to have the sample analyzed by the CFL is not only a valuable right but it is also in order that for his (accused) own satisfaction and proper defence. The impact of the certificate given by the Director of CFL is threefold. It annuls or replaces the report of the Public Analyst, it gains finality regarding the quality and standard of the food article involved and it becomes irrefutable so far as the facts stated therein are concerned and therefore, this provision has been held mandatory by the Apex Court, this Court and other High Courts. The ratio of the decision in the case of Calcutta Municipal Corporation v/s. Pavan K. Saraf, reported in 1999(1) FAC 8, positively helps the present petitioner. Technically in the present case, it can also be said that failure on the part of the CFL to send the report of analysis within one month would adversely affect the case of the prosecution and the petitioner-accused can successfully submit that it is noncompliance of the

mandatory provisions and, therefore, the same vitiates the prosecution. The case of Motilal Agrawal v/s. Delhi Administration, reported in 1998(2) FAC 329, also helps the accused, wherein the Delhi High Court has held that unusual delay taking place at the end of Director in analyzing the sample obviously prejudices the case of the accused. It is not necessary to refer to the case of Chetumal v/s. State of M.P., reported in 1981 (1) FAC 280, wherein the Court has held that there is no scope to fall back upon the report of the Public Analyst on the moment on which the CFL analyses the sample. So it can be said that considering the entire scheme of Section 13 of the PFA Act, when the learned Magistrate sends a sample for analysis to CFL and the same is received by the CFL, then practically the finding recording by the Public Analyst would become redundant or not of much help to the prosecution because the opinion of CFL may or may not favour the prosecution.

10(i) The facts in the case of Coromandal Distributors v/s. Food Inspector, reported in 1998 (2) FAC 101, are different but the ratio laid down by the Kerala High Court positively helps the present petitioner, wherein the Kerala High Court has analyzed and interpreted the scheme of Section 13(2)(B) and (2)(C) of the PFA Act. In this decision, the sample was found decomposed and unfit for analysis and, therefore, on the request, the learned Magistrate sent the third sample for analysis to the CFL. While answering the question as to whether the sample decomposed can be said to be damaged or lost, the Kerala High Court has held that it cannot be said to be a sample damaged or lost and further held that only when the second sample is lost or damaged, the Court can order that the third sample can be sent to the CFL, wherein it is clear that if the sample received by the CFL is not lost or damaged, there is no scope to consider the report of analysis of the third sample because Section 13(2)(C) of the PFA Act provides that only when the second sample is lost or damaged, the Court can order that the third sample be sent to the CFL. Section 13(3) of the PFA Act attaches finality to the certificate issued by the Director of CFL.

10(ii) So in the present case, it is difficult to reach to a conclusion that the learned Magistrate was justified in sending the third sample for analysis in view of the scheme of the PFA Act and report/certificate issued by the Director of CFL cannot be viewed as an opinion having finality within the meaning of Section 13(3) of the PFA Act. The rejection of application resisting the request advanced by the Director of CFL, therefore, can be said

to be an erroneous finding. The learned Magistrate ought to have allowed the application at Exh.13 and could have terminated the proceedings against the petitioner-accused holding that failure in sending the report/certificate within one month from the date of receipt of the sample by the CFL vitiates the prosecution. At least after considering the date of suspension of the concerned Director of CFL, such finding could not have been recorded. The Punjab and Hariyana High Courts in the case of State of Hariyana v/s. Laxmi Chand, reported in 1998 (2) FAC 287, in the background of the facts of the present case, would help the petitioner-accused. The decision of Himachal Pradesh High Court in the case of Chetram v/s. State of H.P., reported in 1997(1) FAC 219, also helps the present petitioner. Of course, the Court was dealing with the application under Section 482 of the Criminal Procedure Code but while dealing with the quashing proceedings by exercising inherent powers, the Court has considered the scheme of Sections 13(2), 12(2(B), 13(2)(C) and 13(3) of the PFA Act. In view of the discussion in paras :6 to 9 of the decision, the Himachal Pradesh High Court has held that :

"10. On the basis of the aforesaid provision of law, the third part could be sent to the Director in case the sample already sent by the Court to the Director was lost or damaged. In the present case, neither the sample was lost nor damaged as has been referred by the certificate issued by the Director, already discussed above. According to Director, the seals were intact and those tallied with the sample of seals sent to him. The sample had been damaged, meaning thereby broken etc. In so far as the contents of the sample were concerned, those were found de-composed and were not fit for analysis, meaning thereby that the quality of the sample was not maintained to be same when it was taken and when it was to be analysed by the Director, for it is a mandatory obligation cast upon the Food Inspector to add preservative in such a manner and to take the sample in such a manner so that the quality of the sample is not de-composed or changed, till it was analysed. In this view of the matter, definitely prejudice has been caused, moreso, to the defence of the accused and a very valuable right given to him could not be exercised due to no fault on his part."

11. The fact that (i) nonreceipt of the report from

CFL within one month from the date of receipt of the sample in the year 1995, (ii) by an inconveniencing reason, the CFL has requested the learned trial Court to send the third sample and (iii) the act of sending the third sample not in conformity with the statutory provision, emerging from the record of the present case; takes this Court to a conclusion that the Revision Application shall be allowed. The stand taken by the complainant in the affidavit-in-reply is not found convincing as it mainly deals with certain decisions and the ratio laid down by the various High Courts. It is true that the ratio of a decision can be applied in light of the facts of each case and the same should not be applied mechanically but it is difficult for this Court to say that some set of different facts in the cited decisions would make the ratio inapplicable. On the contrary, the scheme of Section 13 of the PFA Act, if is read in context to the facts of the present case, justifies the stand taken by the present petitioner, especially when the scheme of subsections (2), (2)(B), (2)(C) and (3) of Section 13 of the PFA Act has been held mandatory by the Apex Court. None should be asked to face the entire trial for the sake of facing it when the Court is of a positive view that the procedure is not sustainable.

12. For short, the Revision Application is allowed. The order dated 29th June, 2001, under challenge, passed by the learned Judicial Magistrate (F.C.), Pardi, is hereby quashed and the proceedings of Criminal Case No.1059/1995, pending in the Court of learned Judicial Magistrate (F.C.), Pardi, are hereby terminated and the petitioner-accused is hereby ordered to be discharged as the charge is not found sustainable in light of the reasons assigned hereinabove. Rule is made absolute.

(C.K. Buch,J)

Aakar